(2)

No. 88-295

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

LOCAL UNION 598, PLUMBERS & PIPEFITTERS INDUSTRY JOURNEYMEN & APPRENTICES TRAINING FUND,
Plaintiff-Appellant,

VS.

J.A. JONES CONSTRUCTION COMPANY; BECHTEL POWER CORPORATION; and JOHNSON CONTROLS, INC.,
Defendants-Appellees.

On Appeal
From The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE

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Defendants-Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Foundation For Fair Contracting (hereinafter, "the Foundation") hereby respectfully moves for an order granting leave to file a brief amicus curiae in support of Appellant's Jurisdictional Statement in the above-titled case pursuant to Rule 36.1 and Rule 42 of the Revised Rules of this Court. Consent of Appellees has been requested and denied. Consent of Appellant has been granted and filed with the Clerk.

In support of this motion, the Foundation states as follows:

1. The Foundation for Fair Contracting is a private, non-profit organization, existing under the laws of the State of California, whose membership consists of labor and management organizations in the construction industry throughout the 46 northern California counties. Its members include the Operating Engi-

neers, Laborers, and Cement Masons local unions and the Associated General Contractors of California, the Underground Contractors Association, and the Association of Engineering Construction Employers. The purpose of the Foundation is to monitor compliance with prevailing wage laws in California.

The problems and issues which have arisen in the above-titled case are similar to problems and issues which labor and management have faced in California, and the ruling by the Court of Appeals for the Ninth Circuit on the question whether ERISA[1] preempts Washington's prevailing wage law, RCW 39.12, insofar as it includes in its minimum wage calculation a specified portion to be payable to an employee benefit fund, threatens to have serious negative consequences for the prevailing wage law in California and for the persons affected by that law.

California's prevailing wage statute, like the Washington statute at issue here, is intended to prevent public works from depressing the level of wages in the state, to encourage employment of local labor and discourage the import of low wage labor from out of state, and to promote fairness in competition between contractors bidding for public works contracts. As an incidental effect, the statute also encourages employers on public works contracts and in the construction industry generally to provide employee fringe benefits. If the Ninth Circuit's ruling in the case here being appealed were to be left standing, the intent and benefits of California's prevailing wage law might be lost, even though it, like RCW 39.12, does not purport to regulate, directly or indirectly, the terms or conditions of any employee benefit plan which might incidentally be benefitted by it.

Moreover, if the reasoning followed by the Ninth Circuit in its decision below were to remain standing, California's statute regulating the employment of apprentices on public works projects might also be set aside. *See Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprentice ship Committee*, 685 F. Supp. 718, 726 (N.D. Cal. 1988) (enforcement of

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[1] "ERISA" refers to the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, at 66 Stat. 829 (1974), as amended (codified in scattered sections of 5, 18, 26, 29, and 31 U.S.C.)

California Labor Code Section 1777.5—Employment of Registered Apprentices—denied in part because it requires public works contractors to make payments to an apprenticeship program).

As in the case on appeal here, so in the case cited above, legitimate state purposes stand in danger of being defeated simply because state laws which purport neither directly nor indirectly to regulate the terms or conditions of employee benefit plans nevertheless benefit such plans economically. We believe the purposes neither of ERISA's preemption provision nor of ERISA would be served by extending ERISA preemption to encompass such state laws.

2. The Foundation seeks in its brief to address the question presented by the Appellant: Did Congress intend ERISA to preempt long-standing state prevailing wage laws which include in their minimum wage calculation a specified portion payable to an apprenticeship fund?

3. The Foundation, by virtue of the experience of its members and its counsel in matters regarding both state prevailing wage laws and employee benefit plans in the construction industry in California, are particularly able to advise this Court as to the operation and effect of such laws on the construction industry and on employee benefit plans and as to the potential effect of the decision by the Ninth Circuit in this case on California law and on the interests affected by it.

For the foregoing reasons the Foundation respectfully requests that it be granted leave to file the accompanying brief as amicus curiae in support of Appellant's Jurisdictional Statement.

Dated: September 13, 1988

Respectfully submitted,

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Defendants-Appellees.

BRIEF OF THE FOUNDATION FOR FAIR CONTRACTING AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

NOW COMES The Foundation for Fair Contracting as amicus curiae and submits this brief in support of Appellant's Jurisdictional Statement in the above-titled action. This brief of amicus curiae is submitted pursuant to Rule 36.1 of the Rules of the Supreme Court and upon the attached motion for leave to file this brief amicus curiae.

INTEREST OF AMICUS CURIAE

The interest of the Foundation for Fair Contracting is set forth in the Foundation's motion for leave to file this brief amicus curiae.

SUMMARY OF ARGUMENT

This Court should give plenary consideration to the question brought by Appellants because it raises a substantial federal question that has yet to be decided by this Court and that has far-reaching implications, and because prior decisions by this Court suggest that the decision below should be reversed.

1. As the Appellant has pointed out in its Jurisdictional Statement, p. 5, this Court has not had occasion as yet to decide either the question presented by this appeal: Did Congress intend ERISA to preempt state minimum wage laws which include, in calculating the minimum wage, a portion payable to an employee benefit plan? or the question raised by the reasoning of the Court below: Does a state law which affects only funding of welfare benefit plans (as opposed to administration, benefits, reporting, disclosure, or fiduciary responsibilities) fall within ERISA's pre-emptive reach?

2. Yet, the decision below, even if restricted in application to similar prevailing wage laws, would affect such laws in some twenty-three states and would affect not only apprenticeship plans but all employee benefit plans because employer contributions to all employee fringe benefit plans are included in calculating the rate of prevailing wages. Moreover, broadly construed, the reasoning relied upon by the Court below to preempt Washington's prevailing wage law might result in preempting not only state prevailing wage laws but any state law which, though not regulating the terms or conditions of an employee benefit plan, might benefit such plans economically or for any purpose require employers to make payments to an employee benefit plan.

3. Decisions of this Court show that the decision below should be reversed.

> (a) Decisions by this Court and by the district courts indicate that ERISA does not preempt state laws which merely affect employee benefit plans economically but which do not intrude into matters preemptively regulated by ERISA or intended by ERISA to be free from state regulation.

(b) The law at issue in this case, though economically benefitting employee benefit plans, does not intrude into matters preemptively regulated by ERISA or intended by ERISA to be free from state regulation. Contrary to the decision of the Ninth Circuit below, Washington's prevailing wage law does not create "funding requirements" as that term is used in ERISA; indeed, ERISA neither regulates nor protects from state regulation the funding of employee welfare benefit plans such as the apprenticeship plan which is plaintiff-appellant here.

(c) Since prevailing wage laws do not intrude into matters regulated by ERISA or preserved from state regulation by ERISA, preemption of such laws would not serve the purposes either of ERISA or of its preemption provision.

ARGUMENT

A. Plenary Consideration is Warranted Because this Court Has Not Yet Decided the Questions Raised by this Appeal

As Appellant has pointed out in its Jurisdictional Statement, p. 5, this Court has not yet decided either the question presented by this appeal: whether Congress intended ERISA to preempt state minimum wage laws which include, in calculating the minimum wage, a portion payable to an employee benefit plan; or the question raised by the reasoning of the Court below: whether a state law which affects only funding of welfare benefit plans (as opposed to administration, benefits, reporting, disclosure, or fiduciary responsibilities) falls within ERISA's preemptive reach.

B. Plenary Consideration is Further Warranted Because the Decision Below and the Questions Raised on Appeal Have Far-reaching Implications

The Ninth Circuit in its decision below has held that "to the extent the Washington prevailing wage statute requires employers to maintain a certain level of contributions to employee benefit plans, it is preempted by [ERISA] section 514(a)." *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213,

1221 (1988). However, said statute merely requires contractors on public works to pay laborers wages "not less than the prevailing rate of wage . . . in the same trade or occupation in the locality" (RCW 39.12.020) and defines the "prevailing rate of wage" in the locality as including the rate of employer contributions for employee fringe benefits (RCW 39.12.010).

Washington's prevailing wage statute is modeled on the federal Davis-Bacon Act, 40 U.S.C. Sec. 276, and is similar to prevailing wage laws in some twenty-two other states (Jurisdictional Statement, n. 4), including California. *See* Cal. Lab Code Secs. 1771 and 1773.1. Such laws meet legitimate, traditional state purposes which Congress itself has recognized and supported in enacting the Davis-Bacon Act. *United States v. Binghamton Construction*, 347 U.S. 171, 176-78 (1954). Such laws are intended to prevent public works from depressing the level of wages in the state, to encourage employment of local labor, to discourage the import of low wage labor from out of state, and to promote fairness in competition between contractors bidding for public works contracts. As an incidental effect, the statute also encourages employers on public works contracts and in the construction industry generally to provide employee fringe benefits. However, if the ruling of the Ninth Circuit were left standing, the intent and benefits of such laws, including California's, might be lost, even though such laws do not intrude into matters regulated by ERISA or intended by ERISA to be free from state regulation and even though the federal Davis-Bacon Act, which has similar purposes and effects, would continue to apply to the same contractors on federal public works.

Moreover, if the reasoning followed by the Ninth Circuit in its decision below were to remain standing, California's statute regulating the employment of apprentices on public works projects might also be set aside. *See Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprentice ship Committee*, 685 F. Supp. 718, 726 (N.D. Cal. 1988) (enforcement of California Labor Code Section 1777.5—Employment of Registered Apprentices—denied in part because it requires public works contractors to make payments to an apprenticeship program). If the reasoning on which the Ninth Circuit's ruling is

based were to be followed, ERISA would appear to preempt not only state prevailing wage laws but any state law which for any reason would require employers to make payments to employee benefit plans. This would mean that simply because an employee benefit plan would receive such payments, California could not require public works contractors, who benefit from the skilled work force provided by state-approved apprenticeship plans, to contribute to paying the costs of such plans.

C. Plenary Consideration is Warranted also Because Prior Decisions of this Court Suggest that the Decision Below Is in Error and Should Be Reversed

According to the holding of the Ninth Circuit in the decision below, the Washington prevailing wage statute is preempted by ERISA "to the extent [it] requires employers to maintain a certain level of contributions to employee benefit plans." *Local 598 v. J.A. Jones*, 846 F.2d at 1221. However, said statute merely requires contractors on public works to pay laborers wages "not less than the prevailing rate of wage . . . in the same trade or occupation in the locality" (RCW 39.12.020) and defines the "prevailing rate of wage" as including the rate of employer contributions for employee fringe benefits (RCW 39.12.010). In no way does that statute intrude into matters regulated by ERISA or preserved from state regulation by ERISA. In prescribing a minimum wage rate for employees on public works, it merely benefits economically those employee benefit plans which, representing the interests of employees, become rightful claimants of employer fringe benefit contributions. Therefore, the holding by the Ninth Circuit below means that prevailing wage laws such as Washington's are preempted by ERISA simply because employers, for whatever reason, may be required to make payments to employee benefit plans, thereby economically benefitting such plans and so possibly affecting the level of benefits which they may provide. *See Local 598 v. J.A. Jones*, 846 F.2d at 1219. Decisions of this Court, however, indicate that ERISA does not preempt a state minimum wage law which, in pursuit of traditional state purposes, so indirectly affects employee benefit plans.

1. Decisions of this Court and of the Circuit Courts Indicate that State Laws which Affect Employee Benefit Plans Economically but which Do Not Intrude into Matters Regulated by ERISA or Preserved from State Regulation by ERISA Are Not Preempted by ERISA

Section 514(a) of ERISA provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to ERISA. 29 U.S.C. Sec. 1144(a). This Court has construed "relate to" in broad terms, so that "'[a] law relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983). However, this Court has also advised that the scope of ERISA preemption is not unlimited. In the interest of preserving our federal system, "the exercise of federal supremacy is not lightly presumed. . . . Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). In determining the scope of federal preemption, "the purpose of Congress is the ultimate touchstone." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. ____, 95 L.Ed.2d 39, 46 (1987). Lower courts have been advised by this Court to "begin with the language employed by Congress [and to] presume that Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). *See*, e.g., *Mackey v. Lanier Collection Agency*, 486 U.S. ____, 100 L.Ed.2d 836, 851 (1988) (state general garnishment law as applied to employee benefit plans is not preempted by ERISA); *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (state garnishment law employed to enforce alimony and support orders is not preempted), *cited in Shaw v. Delta Air Lines*, 463 U.S. at 101, n. 21. Accordingly, in those decisions where this Court has sought to determine the scope of ERISA preemption, it has looked to the plain language of ERISA and its preemption provision, to the underlying purpose of ERISA's preemption provision, and to the overall objectives of ERISA itself. (*See, e.g.*,

Fort Halifax Packing Co. v. Coyne, 482 U.S. ____, 96 L.Ed.2d 1, 9 [1987]), and it has concluded that a state law which does not implicate ERISA's regulatory concerns or ERISA's concern for uniform regulation of employee benefit plans is not preempted by ERISA. *Id.* 96 L.Ed.2d at 13.

In those cases where state law undeniably has intruded into administration of employee benefit plans, this Court, following the language of ERISA, Sec. 514(a), has been able to find preemption by ERISA simply by asking whether a state law "relates to" employee benefit plans. *See*, e.g., *Allessi v. Raybestos-Manhattan*, 451 U.S. at 524; *Shaw v. Delta Air Lines*, 463 U.S. at 96; and *Pilot Life v. Dedeaux*, 95 L.Ed.2d at 47. Even then this Court warned that "[s]ome state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines*, 463 U.S. at 101, n. 21. Accordingly, in those cases where state law has been found to affect employee benefit plans but not to intrude into matters regulated by ERISA or intended by ERISA to be free from state regulation, this Court has begun to define the limits to ERISA preemption and has found that it does not apply.

In *Fort Halifax*, 96 L.Ed.2d 1, this Court denied preemption by examining the language of ERISA and its preemption provision and the underlying purposes of both. The Court found: that ERISA's preemption provision applied only to state laws that relate to employee benefit *plans* and not to laws that relate merely to employee benefits (*Id.*, 96 L.Ed.2d at 9); that the purpose of ERISA's preemption provision was to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans" in order "to afford employers [or plan trustees] the advantages of a uniform set of administrative procedures governed by a single set of regulations" (*Id.*, 96 L.Ed.2d at 10 and 11); and that the scope of that preemptive concern is limited to serving the regulatory purposes of ERISA, which had been enacted to provide uniform reporting, disclosure, and fiduciary rules to govern employee benefit plans and their administration. This Court concluded that where state law implicated the concerns of neither ERISA's preemption provision nor the regulatory concerns of

ERISA itself, state law is not preempted by ERISA. *Id.* 96 L.Ed.2d at 13.

In *Mackey v. Lanier Collection Agency, supra,* this Court followed a similar procedure: to determine the scope of ERISA preemption, it examined the content and structure of ERISA itself. The Court found that Congress, in enacting ERISA, was fully aware that employee benefit plans were affected by numerous, if not innumerable, state laws and, in choosing to preemptively legislate as to only certain matters, had acknowledged and accepted prevailing state law affecting employee benefit plans as to other matters. *Id.,* 100 L.Ed.2d at 848-49. Such a conclusion agrees with the language itself of ERISA's preemption provision: state law is superseded only by "the provisions" of ERISA, not by the fact that it may affect employee benefit plans.

Decisions by the circuit courts have similarly defined the limits of ERISA preemption in terms of the regulatory content and purpose of ERISA. Paying heed to the language of ERISA, Sec. 514(c)(2), where Congress defined "State" for the purposes of preemption of state law to include any agency or subdivision thereof "which purports to *regulate, directly or indirectly, the terms and conditions of employee benefit plans*" (emphasis added), these courts have concluded that in order to fall under ERISA preemption a state law must not only relate to or affect employee benefit plans but also must purport to regulate in one way or another these terms or conditions of such plans that Congress intended ERISA to regulate or to preserve from state regulation. *See,* e.g., *Stone & Webster Engineering Corp. v. Ilsley,* 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem. sub nom Arcudi v. Stone & Webster,* 463 U.S. 1220 (1983) ("A state law 'relates to' an employee benefit plan and is subject to preemption whenever it 'purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans"); *Rebaldo v. Cuomo,* 749 F.2d 133, 137 (2d Cir. 1984), *cert. den.,* 105 S.Ct. 2702 (1985) ("Thus, a state law must 'purport to regulate, . . . the terms and conditions of employee benefit plans' to fall within the preemption provision"); *Lane v. Goren,* 743 F.2d 1337, 1339 (9th Cir. 1984) ("before a court may find a state statute is superseded [by ERISA], . . . the state statute must attempt to reach in one way

or another the 'terms and conditions of employee benefit plans"); and *Martori Bros. Distributors v. James-Massengale,* 781 F.2d 1349, 1359 (9th Cir. 1986), *cert. den.,* 107 S.Ct. 435, 670 ("a state law must also 'purport to regulate' ERISA plans before it can be held to be preempted").

As this Court and the circuit courts have frequently observed, "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans;" and for that purpose ERISA "imposes participation, funding, and vesting requirements on pension plans" and "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare benefit plans." *Shaw v. Delta Air Lines,* 463 U.S. at 91. ERISA also provides an exclusive scheme of civil enforcement of plan rights and terms as well as of it own provisions. *Pilot Life v. Dedeaux, supra.* In addition, although ERISA does not regulate the substantive content of welfare benefit plans, ERISA's pre-emption provision has been construed to preserve such matters from state regulation in the interest of preventing conflicting or inconsistent state or local regulation of such matters, which thus have been left to collective bargaining. *Shaw v. Delta Air Lines, supra.* As a result, the Ninth Circuit in *Martori Bros. Distributors,* 781 F.2d at 1356-57, accurately concluded that ERISA preemption is limited to state laws that intrude into any of four areas, i.e., areas regulated by ERISA or intended by ERISA to be free from state regulation:

> "First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plans."

Following such reasoning, both this Court and courts below have refused to find that ERISA preempts state laws which, short of intruding into matters regulated by ERISA or preserved from state regulation by ERISA, merely affect them economically. In *Mackey v. Lanier Collection Agency,* 100 L.Ed.2d at 845, this

Court held Georgia's general garnishment statute not preempted by ERISA even though garnishment undeniably imposes administrative burdens and costs on such plans. So, too, the Second Circuit in *Rebaldo v. Cuomo*, 749 F.2d at 138, held that a New York law precluding self-insured employee benefit plans from negotiating discounted rates with hospitals is not preempted by ERISA even though it would have an economic impact on such plans. And the Ninth Circuit in *Lane v. Goren*, 743 F.2d at 1340, held that California's employment discrimination law is not preempted by ERISA even though it increases the costs of operating such plans.

2. Contrary to the Decision below, Washington's Prevailing Wage Law, though Economically Benefitting Employee Benefit Plans, Does Not Intrude into Matters Preemptively Regulated by ERISA or Intended by ERISA to Be Free from State Regulation

The Ninth Circuit in its decision below held that Washington's prevailing wage statute is preempted by ERISA because it "create[s] funding requirements for employee benefit plans." It reasoned that insofar as the statute may require employers to maintain a certain level of contributions to employee benefit plans, it must be preempted by ERISA because "[e]mployer contributions are the fuel for benefit plans," indeed, "the rate of [employer] contribution rests at the very core of ERISA's considerations." *Local 598 v. J.A. Jones*, 846 F.2d at 1218-19.

Yet, ERISA does not set "funding requirements" for employee welfare benefit plans, such as the Appellant's, at all; ERISA's "funding requirements" apply only to pension plans. ERISA, Sec. 301, 29 U.S.C. Sec. 1081. Nor, contrary to the Ninth Circuit's reasoning, does the fact that ERISA leaves employers' obligations to contribute to employee welfare benefit plans unregulated necessarily mean that Congress intended that area to remain free of state regulation. Here, as elsewhere, Congress may have intended state law to remain valid. *Compare Mackey v. Lanier Collection Agency*, 100 L.Ed.2d at 848 (state general garnishment law reaches welfare benefit plans even though Sec. 206(d)(1) exempts pension plans from the operation of such statutes). In fact, Congress has left the question of employers' funding obligations

for welfare benefit plans to collective bargaining, an area where state minimum wage laws have always remained in force. It is only reasonable to conclude, therefore, that Congress did not intend the matter to be free of state regulation but intended it to be subject to the same federal and state laws which have always regulated such matters. It is difficult to believe that Congress, which enacted ERISA to coordinate with federal labor law, would have intended that a minimum wage law which is not preempted by the National Labor Relations Act (*see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 755) should be preempted by ERISA, when the matter at issue—wages and employer fringe benefit contributions—is a matter not for ERISA regulation but for collective bargaining.

3. Since Prevailing Wage Laws Do Not Intrude into Matters Regulated by ERISA or Preserved from State Regulation by ERISA, Preemption of such Laws Would Not Serve the Purposes Either of ERISA or of Its Preemption Provision

The purpose of ERISA's preemption provision has been to eliminate the "threat of conflicting or inconsistent state and local regulation of employee benefit plans." *Fort Halifax*, 96 L.Ed.2d at 10. But there is no such threat where state law does not intrude upon matters regulated by ERISA or intended by ERISA to be left unregulated by state or local law. As in *Fort Halifax, supra*, so here, Washington's prevailing wage law implicates neither the regulatory concerns of ERISA nor the concerns of ERISA's preemption provision and therefore should not be preempted by ERISA.

Congress has left the question of employers' obligations for employee welfare benefits to collective bargaining and has not chosen to exclude state minimum wage or prevailing wage laws from affecting such bargaining. Congress has enacted federal minimum wage and prevailing wage laws and has permitted states to do likewise. This Court has recently advised that "ERISA preemption analysis 'must be guided by respect for the separate spheres of government authority preserved in our federalist system.' " and that "[i]f a State creates no prospect of conflict with a federal statute, there is no warrant for disabling it from attempt-

ing to address uniquely local social and economic problems." *Fort Halifax*, 96 L.Ed.2d at 16. Here Washington's prevailing wage law serves traditional state purposes which Congress itself has recognized in enacting the Davis-Bacon Act and furthers the purpose of ERISA of protecting the financial soundness of employee benefit plans without intruding into matters regulated by ERISA or intended by ERISA to be free of state regulation.

CONCLUSION

For the reasons set forth hereinabove, this Court should give plenary consideration to the question raised by Appellants.

Dated: September 13, 1988

Respectfully submitted,

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